

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

MARLON LATODD HOWELL, AKA :

MARLON COX, :

Petitioner :

v. : No. 03-9560

MISSISSIPPI. :

- - - - -X

Washington, D.C.

Monday, November 29, 2004

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:05 a.m.

APPEARANCES:

RONNIE M. MITCHELL, ESQ., Fayetteville, North Carolina; on  
behalf of the Petitioner.

JAMES M. HOOD, III, ESQ., Attorney General, Jackson,  
Mississippi; on behalf of the Respondent.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
RONNIE M. MITCHELL, ESQ.	
On behalf of the Petitioner	3
JAMES M. HOOD, III, ESQ.	
On behalf of the Respondent	22
REBUTTAL ARGUMENT OF	
RONNIE M. MITCHELL, ESQ.	
On behalf of the Petitioner	49

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:05 a.m.)

JUSTICE STEVENS: We'll hear argument in Howell  
against Mississippi.

Mr. Mitchell.

ORAL ARGUMENT OF RONNIE M. MITCHELL

ON BEHALF OF THE PETITIONER

MR. MITCHELL: Justice Stevens, and may it  
please the Court:

The Court has directed us to address, in  
addition to the question raised in the petition for writ  
of certiorari, the following question. Was petitioner's  
Federal constitutional claim properly raised before the  
Mississippi Supreme Court for purposes of 28 United States  
Code, section 1257?

Accordingly, we begin by addressing that  
question and answering it affirmatively. Here, Howell  
maintains, one, the standards for adjudicating State and  
Federal claims of this particular type are identical --

JUSTICE GINSBURG: Where --

MR. MITCHELL: -- where they're labeled as  
such --

JUSTICE GINSBURG: -- where was that -- where  
was that maintained? Because I thought that below, all  
there were this was a -- was it a lesser-included offense

1 under State law, and I didn't see below any reference to  
2 the Federal Constitution.

3 MR. MITCHELL: Justice Ginsburg, we believe that  
4 the rule in Beck establishes that State law must be viewed  
5 and State law is the determiner of whether an offense is a  
6 lesser-included offense, but Federal law, the Federal  
7 Constitution determines whether, as a matter of due  
8 process under the Fourteenth Amendment and Eighth  
9 Amendment concerns, whether an instruction must be given  
10 as a Federal constitutional matter.

11 JUSTICE SOUTER: And -- and the standards under  
12 Beck are different from the standards under the roughly  
13 comparable State rule, as I understand it, because under  
14 the State rule, the lesser offense need not be an included  
15 offense, in the technical sense; and number two, there  
16 need not be, in the absence of a further instruction, a --  
17 a limitation to the jury to two choices, death or  
18 acquittal, so that unless one is very careful to raise the  
19 Federal standard, simply raising the State standard  
20 wouldn't do it.

21 MR. MITCHELL: Respectfully, Justice Souter, we  
22 would submit that Mississippi's own law says that it  
23 embraces the Beck standard and that Mississippi's own  
24 law --

25 JUSTICE SOUTER: Sure, it embraces it because

1     it's broader, which means that if you raise -- if you --  
2     if you make a claim under the State standard, you are not  
3     necessarily making a claim under the narrower, more  
4     restrictive Federal standard.

5             MR. MITCHELL: We would respectfully submit that  
6     -- that in Mississippi, for example, as contrasted with  
7     the statutory scheme that was present in Hopkins, the  
8     Nebraska scheme, in the Mississippi scheme, Mississippi  
9     has held that simple murder is a lesser-included offense,  
10    and therefore, by definition that offense at least mirrors  
11    what is required under Beck.

12            Now, the question of whether some other  
13    lesser --

14            JUSTICE SOUTER: What about -- what about the --  
15    the Beck condition that in the absence of the instruction,  
16    there must be a choice between -- the jury must be  
17    confined to a choice between death and acquittal?

18            MR. MITCHELL: In --

19            JUSTICE SOUTER: That's -- that's not the same  
20    in the State's scheme, is it?

21            MR. MITCHELL: Well, we believe that -- that it  
22    is the same. And in fact, the -- the case that the State  
23    cites, State v. Goodin, explains that. The representation  
24    of Goodin in the State's brief, as it appears in the  
25    respondent's brief at page 23, we contend is not

1 faithfully representative of what the Court said in that  
2 case.

3 JUSTICE SOUTER: Is -- is Goodin the case that  
4 -- that stands for the proposition that under -- under  
5 State law, the -- the jury has an -- an option to sentence  
6 for life, as -- as well as -- as to impose the death  
7 sentence?

8 MR. MITCHELL: Goodin is the case that the State  
9 cited for that purpose, but an analysis of what the  
10 Mississippi Supreme Court actually said at page 656 of the  
11 Southern Reporter, 787, is this. The Goodin jury did not  
12 face the dilemma of the Beck jury. Here, the jury's  
13 alternatives in the guilt phase were to convict Goodin of  
14 capital murder, simple murder, or to acquit him, which is  
15 the very purpose that the later cases -- and Beck itself  
16 explains. Schad, for example, explains that the reason  
17 for the Beck determination was that presenting only the  
18 option of convicting of a capital offense or acquitting  
19 was not constitutionally permissible.

20 JUSTICE SOUTER: So -- so I just want to make  
21 sure I know where we stand. You're saying that the  
22 assumption I was making, that under Mississippi law, in  
23 the absence of an instruction for a lesser offense, the  
24 jury has an option not only to acquit or to impose the  
25 death penalty, but an option of life with or without

1 parole, that assumption is simply incorrect as a -- as a  
2 fact about Mississippi law.

3 MR. MITCHELL: No, I do not believe that is  
4 incorrect. I'm sorry, Your Honor. What I do believe is  
5 correct is that under Mississippi law, the jury, because  
6 of the bifurcated nature of the -- of the case, is given  
7 at least the preliminary reference or preliminary  
8 instruction that if there is a guilt verdict, then there  
9 will be a sentencing phase. But we submit that that is a  
10 distinction that this Court has not adopted, nor have  
11 other courts adopted because in this situation --

12 JUSTICE SOUTER: But it takes you out of Beck,  
13 at least arguably, doesn't it? The -- the question is,  
14 have you raised something that is necessarily on all fours  
15 with Beck? And given this sentencing scheme, we can't say  
16 that simply raising a State claim necessarily raises the  
17 Beck claim. Isn't that true?

18 MR. MITCHELL: Your Honor, we would respectfully  
19 disagree with that position because of the analysis that  
20 the Court has undertaken, for example, in Hopkins and  
21 because of the analysis in Spaziano v. Florida. In those  
22 cases, they were presented with schemes in which the jury  
23 did not, of necessity, impose the death penalty. However,  
24 the jury was confronted with exactly the same position --

25 JUSTICE SOUTER: But the consequence of the jury

1 verdict was -- was the death penalty.

2 MR. MITCHELL: Well, the consequence of the jury  
3 verdict may have been the death penalty. For example, in  
4 Spaziano, the -- the jury returned a verdict of guilty.  
5 The jury recommended life, but the judge imposed a  
6 sentence of death nevertheless. In the Hopkins case, the  
7 -- a three-judge panel then imposed the death penalty.  
8 Those -- those differences in sentencing schemes we do not  
9 believe separates the rationale of Beck which is the  
10 danger of affecting the jury verdict by being faced with  
11 the dilemma of either convicting of a capital offense or  
12 acquitting.

13 JUSTICE SCALIA: Mr. Mitchell, my -- my problem  
14 is even more fundamental than Justice Souter's. Conceding  
15 that the rule in Mississippi is exactly the same as the  
16 Federal rule in Beck, it doesn't seem to me that arguing  
17 Mississippi law, just because it happens to be the same as  
18 Federal law, amounts to raising a Federal question.

19 Let's assume you have a -- a State law against  
20 wire-tapping. It is unlawful. And you -- you come in and  
21 you ask that the evidence be -- be excluded because it's  
22 contrary to the State law. Have you raised a -- a Federal  
23 -- a Federal question when all you cite is the State law,  
24 even though the effect under State law is the same as the  
25 Federal effect under the Fourth Amendment? It's not my



1 understanding that you've raised a Federal question.

2 MR. MITCHELL: I do not believe that I would  
3 have unless in that particular State, if its highest court  
4 had said, we embrace the same standard and we apply the  
5 same --

6 JUSTICE SCALIA: That's all it takes for the New  
7 York State Supreme Court, for example, to have said, well,  
8 you know, our -- our wire-tap statute does the same thing  
9 as the Fourth Amendment does anyway? That's all it takes?

10 MR. MITCHELL: I believe --

11 JUSTICE SCALIA: And thereafter, all you have to  
12 do is cite the New York State statute, and you've raised a  
13 Federal question.

14 MR. MITCHELL: No, respectfully, Your Honor.  
15 However, if the State supreme court has adopted not only  
16 the same purpose, but the very language and has, in  
17 effect, said, our ruling in these cases is controlled by  
18 the same provision of law, whether a -- a decision of this  
19 Court, as in the Beck standard that we believe Mississippi  
20 has adopted, or if the court has articulated that the  
21 United States Constitution controls this particular  
22 provision.

23 JUSTICE SCALIA: Well, I mean, if -- but the  
24 State standard always has to -- has to comply with the  
25 Federal requirement, doesn't it?



1 interwoven, we believe the jurisdiction of this Court, as  
2 the Court has said, is plain.

3 JUSTICE SCALIA: So we have to figure out in  
4 every case whether the two claims are interwoven. Do you  
5 think -- do you think counsel for the defense isn't always  
6 going to say that they're interwoven?

7 MR. MITCHELL: I think counsel for the defense  
8 would, indeed, contend that they were interwoven.

9 JUSTICE SCALIA: I don't think it's too much to  
10 ask counsel for the defense to say, we are raising a  
11 Federal question. And it solves the problem.

12 MR. MITCHELL: The -- the difficulty in saying  
13 that we -- that we raise a Federal question is that  
14 suppose, in this instance, the trial counsel and appellate  
15 counsel, Mr. Lott, had said, the jury in this case is  
16 presented with an untenable position, convicting of a  
17 capital offense or acquitting. That's untenable and that  
18 raises a Federal question. Would the State then concede  
19 that that was a sufficient assertion of a Federal  
20 constitutional claim? Probably not, and that is because  
21 the State contends, just as the amicus brief contends,  
22 that this Court should adopt some inflexible rule that is  
23 extremely and extraordinarily difficult to apply in the  
24 context of, for example, a trial in Mississippi or North  
25 Carolina where counsel understands the lifeblood of the

1 rule, the lifeblood even of the Constitution, but cannot  
2 at the moment recall the correct citation.

3 JUSTICE BREYER: I mean, my goodness, all it  
4 requires -- look, the problem is not a technical problem.  
5 It's a human problem. A judge is a human being. He gets  
6 the petition. There are 28 different issues. That's a  
7 lot of work. He goes down one, two, three, four. He gets  
8 to this issue, which is somewhere hidden among the 28, and  
9 what it says is, there should have been a lesser-included  
10 offense instruction and it cites three Mississippi cases,  
11 which in turn cite one other case, and that -- that other  
12 case says that the Mississippi rule has constitutional  
13 implications and cites Beck. Well, I mean, if that's  
14 supposed to be sufficient, I as a judge would have to, in  
15 every one of these cases that's cited in these 28  
16 different issues, start looking up the other cases in  
17 Mississippi to see if there's some other place they cite  
18 some other case that says something about a Federal case.  
19 I mean, you see it's impossible.

20 MR. MITCHELL: And -- and we would concede that  
21 but for the fact that in this particular instance, this  
22 particular rule is so clearly identifiable.

23 JUSTICE BREYER: But it isn't even because,  
24 after all, Beck talked about an instruction where the  
25 choice was either convict the person of murder, death

1 penalty, or acquit him, and your case happens to involve  
2 an instruction which said to the jury, convict him or give  
3 him a life sentence or acquit him. So we don't even know  
4 if -- if Beck applies to your case. That's never been  
5 decided.

6 MR. MITCHELL: Well, Your Honor, we would  
7 respectfully submit suppose that the -- that Howell's  
8 counsel here had called this a Schad issue, for example,  
9 where a sentencing scheme somewhat similar to the  
10 present --

11 JUSTICE BREYER: I don't even know -- I am so  
12 ignorant I don't even know if Schad is a Federal case or a  
13 State case.

14 MR. MITCHELL: And -- and --

15 JUSTICE BREYER: So I guess if he had, he should  
16 have said Fed or U.S. or whatever it is so that I'll know.

17 MR. MITCHELL: Or -- or suppose --

18 JUSTICE BREYER: That doesn't seem like such a  
19 burden.

20 MR. MITCHELL: Or -- or --

21 JUSTICE SOUTER: I -- I wrote it.

22 (Laughter.)

23 MR. MITCHELL: But Justice Souter --

24 JUSTICE KENNEDY: Justice Souter was -- was a  
25 State court judge as well.

1 (Laughter.)

2 MR. MITCHELL: Suppose, though, that this were  
3 not -- were not a -- a lesser-included instruction case.  
4 Suppose that what had happened in this case was that  
5 Howell had stood before the judge and said, I'm asking for  
6 you to appoint counsel, and the judge said, well, under  
7 the law of this State, I don't have to do that. But then  
8 Howell had responded, but the Supreme Court says that you  
9 do. Would that then be sufficient to raise --

10 JUSTICE BREYER: Supreme Court? Yes, that's  
11 probably pretty clear it's Federal.

12 MR. MITCHELL: Well --

13 JUSTICE BREYER: Maybe he meant the State  
14 supreme court.

15 MR. MITCHELL: Maybe he meant the State supreme  
16 court.

17 JUSTICE BREYER: All right. I'm saying you  
18 don't carry it to extremes. Don't be ridiculous about it,  
19 but that isn't an extreme case we have. We have which is  
20 the case we have, the State, and then three State cases,  
21 and then referring to one State case that says that Beck  
22 is -- is a constitutional implication citing Beck. I  
23 mean, I don't have to be extreme in order to say yours  
24 isn't that extreme example.

25 MR. MITCHELL: No, but we would say -- we would

1 say this, Your Honor, that the effort to federalize the  
2 claim as was done in the Mississippi Supreme Court was  
3 done in an effort to address the instructions as a whole,  
4 and --

5 JUSTICE O'CONNOR: Well, it isn't even clear  
6 here that Beck would have been violated. As I understand  
7 it, in -- in Mississippi the jury could have given a  
8 sentence less than death despite the conviction. Isn't  
9 that right?

10 MR. MITCHELL: We would concede that. Once the  
11 sentencing phase was reached.

12 JUSTICE O'CONNOR: Yes. So I'm not sure if Beck  
13 even applies on its own terms.

14 MR. MITCHELL: It would be our contention, Your  
15 Honor, that -- that Spaziano v. Florida, that Schad, and  
16 the cases following Beck, Hopkins v. Nebraska even would,  
17 of necessity -- or Hopkins v. Reeves -- I'm sorry -- the  
18 Nebraska scheme -- would, of necessity, report to the  
19 court the continuing vitality of Beck even under these  
20 circumstances, but it -- it is a matter that we believe  
21 was at least made fairly and reasonably presented to the  
22 court.

23 JUSTICE GINSBURG: Mr. Mitchell, what gives me  
24 pause is that there are Mississippi cases -- you no doubt  
25 know them -- where the court has seemed to think that the

1 Federal issue under Beck was discrete from the State  
2 issue. So I forgot the name of them, but one of them was  
3 striking because it says this doesn't run afoul of Beck,  
4 and then it says, now we turn to Mississippi law on  
5 lesser-included offense. And it -- the -- the State  
6 supreme court treated those two as discrete. So when you  
7 just say lesser-included offense, why should the Court  
8 assume that you're talking about one rather than the other  
9 when the Mississippi Supreme Court itself has made it  
10 clear that it thinks they are discrete inquiries?

11 MR. MITCHELL: Justice Ginsburg, we would  
12 respectfully submit that -- that the State's recitation of  
13 Goodin is not a faithful representation of what happened  
14 in Goodin. In Goodin, he was -- the defendant was given  
15 the lesser-included simple murder instruction, which  
16 Howell seeks. It was a robbery case. The report of the  
17 case appears at 787 So.2d, beginning, I believe it's, 639.  
18 At pages 655 and 656, the court addresses the Beck issue,  
19 and it says there that because the jury's alternative in  
20 the guilt phase was either to convict of capital murder or  
21 simple murder or to acquit, then and in that circumstance,  
22 the Beck -- that Beck was not violated. It then says we  
23 must look to our practice to determine whether a  
24 manslaughter instruction should be given.

25 And it is for that reason that we respectfully



1 submit that Goodin does not attempt to distinguish Beck,  
2 but in fact squarely addresses a Beck claim, although --  
3 and we candidly admit -- Goodin's counsel did cite Beck  
4 itself to the Mississippi court. Nevertheless, the claim  
5 was phrased in precisely the same manner in which Mr.  
6 Howell's counsel expressed the same claim.

7           These claims, therefore, we would respectfully  
8 contend, are not virtually identical but are in fact  
9 identical. But even if there were some minor variations,  
10 some deviations, as this Court indicated would appear from  
11 time to time, we contend that clearly that such identity,  
12 such virtual identity is sufficient to raise the issue.

13           In this case, Howell's trial and appellate  
14 counsel raised two issues with regard to the jury  
15 instructions. Those two issues themselves were  
16 interrelated. Those two issues were a whole. Those  
17 issues related to whether or not there was sufficient  
18 evidence to convict of robbery and whether or not -- or  
19 attempted robbery rather, and whether or not there was a  
20 basis to give a lesser-included instruction. The cases  
21 which he cites are State cases related to the necessity of  
22 giving lesser-included instructions where there's an  
23 attempted robbery and simple murder is, therefore,  
24 included in that offense.

25           He also, at the outset of his contentions with

1 regard to jury instructions, says that under the Eighth  
2 and Fourteenth Amendments, these jury instructions -- and  
3 we contend that they must be considered as a whole. These  
4 jury instructions violate his rights under the Eighth and  
5 Fourteenth Amendments. It is our position that this is  
6 sufficient -- while not a cognate of that, is sufficient  
7 to at least be a corresponding claim, a substantially  
8 identical claim to Beck, and one which entitles the  
9 defendant as a matter of due process and as a matter of  
10 Eighth Amendment consideration and concern, to an  
11 instruction.

12           The difficulty that we face in a circumstance  
13 such as this where the instruction is not given is that  
14 the jury's function, while not always reviewable, but  
15 which is always entitled to protection, may be called into  
16 question and the quality of the verdict impeached, in  
17 effect, by the failure to have the third option. In  
18 essence, it is our contention that where a defendant uses  
19 the very words that this Court has used to describe the  
20 constitutional claim, where it uses the very words that  
21 the State supreme court has used --

22           JUSTICE STEVENS: May I ask you this question,  
23 Mr. Mitchell? Supposing the -- there are alternative  
24 lesser-included offenses that might be urged by the  
25 defendant as to -- to get an instruction on, and he asks

1 for the wrong one. In other words, the question -- there  
2 is a question here about exactly what is the lesser-  
3 included offense. It seems to me that if he tried to kill  
4 -- if he killed the driver of the vehicle, there may well  
5 have been some kind of crime. But maybe you ask for a  
6 lesser-included offense of, say, simple murder and the  
7 facts don't fit simple murder, but they might fit  
8 manslaughter or something else. Would your request for --  
9 for a simple murder, lesser-included offense instruction  
10 be sufficient if you should really have asked for a  
11 different lesser-included offense instruction?

12 MR. MITCHELL: We would respectfully submit that  
13 -- that even the Mississippi court has addressed that  
14 situation in -- in a case cited in -- in the briefs in  
15 Mease. And there, the defendant asked five times for  
16 instructions, lesser-included offense instructions, and  
17 never actually got them right. The court said that that  
18 is not a basis upon which to deny the instruction and  
19 then, citing back, said that where there is a proper  
20 lesser-included offense, the fact that the -- that the  
21 defendant does not request the proper instruction still  
22 rises to the constitutional proportions that a Beck claim  
23 does.

24 JUSTICE SOUTER: Is -- is that the case here  
25 too? One of the things that's neither here nor there I

1 guess, but one of the things that perplexed me was that I  
2 would have thought that the lesser-included offense on --  
3 on the theory that the -- that he didn't intend to kill,  
4 he was sprayed with mace, got mad, pulled out a gun, and  
5 shot and so on -- I would have thought the lesser-included  
6 offense was a heat of passion kind of killing. But as --  
7 as I read the -- the statement of -- of simple murder,  
8 which requires a deliberate act, that didn't sound like  
9 it. And I -- I read negligent homicide, and that didn't  
10 sound like heat of passion. But is -- is it your point  
11 here, if -- if we get into it, that as long as you asked  
12 for some lesser-includeds, under Mississippi law that  
13 raises the issue adequately?

14 MR. MITCHELL: We -- we believe that it does  
15 raise it adequately. We believe that it --

16 JUSTICE GINSBURG: But then what would be a  
17 lesser-included offense? Because if it's not simple  
18 murder and it's not manslaughter, you haven't suggested a  
19 third that it might be. I thought your whole position was  
20 that this simple murder was right and the --

21 MR. MITCHELL: We do contend that it was right,  
22 Your Honor.

23 JUSTICE GINSBURG: -- and the judge was obliged  
24 to give it. So why -- in view of what Justice Souter just  
25 said about simple murder requiring a deliberate design,

1 where was the deliberate design here?

2 MR. MITCHELL: We believe that -- that there  
3 are, in effect, two forms of simple murder because of the  
4 structure of -- and in fact, the Mississippi Supreme Court  
5 has said this -- because of the structure of the  
6 Mississippi murder definitions. They are contained in a  
7 number of separate sections, but the most important of  
8 which is that a killing, not done in certain enumerated  
9 felonies, such as robbery or attempt to rob, would  
10 constitute simple murder. We believe that the simple  
11 murder instruction would have been correct. But even if  
12 it were not, we would respectfully submit that that is  
13 sufficient to raise the question.

14 JUSTICE GINSBURG: But what would be if it were  
15 not? What would be the lesser-included offense?

16 MR. MITCHELL: Arguably it would be  
17 manslaughter. For example, the Mease case, which the  
18 State cites and to which I made reference, was a case in  
19 which capital murder was not robbery murder as in this  
20 case, but the killing of a police officer. In Mease,  
21 there was an altercation between the sheriff and Mease.  
22 During that altercation, Mease was struck on the head by  
23 another deputy. His contention was that the gun fired,  
24 which he was holding next to the sheriff's neck. The gun  
25 fired by reaction for two reasons, one that he was in a

1 fight and, secondly, that he was struck. The Mease court  
2 said that that was a proper basis to instruct on  
3 manslaughter, the fact that he had pulled the gun and was  
4 using it during the course of the fight.

5 Now, while I find that case difficult to parse,  
6 we believe that that certainly could have been an argument  
7 that could have been raised and that, albeit it was not,  
8 it could have been a proper instruction to have been  
9 given.

10 If there are no further questions, I'd like to  
11 reserve the remainder of my time.

12 JUSTICE STEVENS: You may.

13 General Hood.

14 ORAL ARGUMENT OF JAMES M. HOOD, III

15 ON BEHALF OF THE RESPONDENT

16 MR. HOOD: Justice Stevens, may it please the  
17 Court:

18 I'd like to make the point, as far as  
19 jurisdiction goes, that -- that the defendant has failed  
20 to make a Federal claim and he is required under Webb v.  
21 Webb. If the Mississippi Supreme Court -- if the lower  
22 court does not address the issue, then it is assumed that  
23 it was not properly raised.

24 Now, as to the issue of Beck, there is no Beck  
25 violation. Actually Mississippi finally -- we've gotten

1 in one instance, we've -- we've become first in -- in this  
2 regard. In Jackson v. State in 1976, our Supreme Court --  
3 which was cited in a footnote 10, I believe, in -- in  
4 Beck. In the Jackson case, Mississippi said -- we had the  
5 same statute, pretty much, that Alabama had that  
6 restricted a lesser-included offense instruction.  
7 Mississippi said, number one, you cannot restrict that  
8 lesser-included offense instruction if it is supported by  
9 the facts, and number two, in the Jackson case, the court  
10 held that there had to be bifurcation, which was the  
11 problem, the impact on the guilt phase. And -- and so I  
12 would submit to the Court that there is no impact in  
13 Mississippi in this case on the guilt phase, nothing to  
14 influence the jurors' decision, and that was the inherent  
15 problem that the Court recognized in Beck.

16 Number two, Mississippi allows a life sentence,  
17 which also distinguishes Beck. It -- it allows the jury,  
18 in a separate, bifurcated hearing, to determine whether or  
19 not the defendant should receive life or the death  
20 penalty.

21 And then thirdly, in Mississippi, we have a  
22 broader standard than the Federal standard. If it's any  
23 lesser offense in Mississippi, then the defendant is  
24 entitled to it if it's supported by the facts of the case.  
25 So we have a broader standard that gives the defendant an

1 easier opportunity to meet that standard.

2 And thirdly --

3 JUSTICE SCALIA: I don't get your point. It  
4 doesn't have to be a -- a lesser-included offense --

5 MR. HOOD: Yes, yes, sir --

6 JUSTICE SCALIA: -- so long as it's a lesser  
7 offense?

8 MR. HOOD: -- Justice Scalia. It just has to be  
9 a lesser offense.

10 And I would submit to the Court that if we are  
11 analyzing a Federal constitutional issue, then perhaps we  
12 -- we should follow Federal constitutional standards,  
13 which was stated -- the strict elements test, in other  
14 words, because under -- under Federal law, it has to be,  
15 well, number one, a lesser-included offense, a true  
16 lesser-included offense, and under the Schmoke case, this  
17 Court has stated that that is in fact applying the strict  
18 elements --

19 JUSTICE STEVENS: May I interrupt with a  
20 question there, General Cox?

21 MR. HOOD: Yes, sir.

22 JUSTICE STEVENS: In this case, if the man  
23 approached the victim in the car and shot him and killed  
24 him, as I understand it, and the theory was an attempted  
25 robbery and therefore the -- the capital offense. Now,



1 are you telling me that if they failed to prove there was  
2 an attempted robbery, it was not an offense at all?

3 MR. HOOD: No, sir. I -- I'm not stating that.  
4 It would -- it would be an offense, but based upon these  
5 facts.

6 JUSTICE STEVENS: But why wasn't he entitled to  
7 an instruction on whatever offense it was?

8 MR. HOOD: Because the -- the facts in this case  
9 show that there was no other reason for him to approach  
10 that vehicle than to rob that individual. There was no  
11 premeditated intent.

12 JUSTICE STEVENS: But his theory was if there  
13 was a failure of proof on the attempted robbery, that all  
14 was left was a -- a killing for some other reason. And if  
15 there was a killing -- if there was a failure of proof on  
16 attempted robbery, would he not then have been entitled to  
17 a -- a lesser offense instruction?

18 MR. HOOD: Yes, sir, Justice Stevens.

19 JUSTICE STEVENS: So what your theory is then --

20 MR. HOOD: It depends on --

21 JUSTICE STEVENS: -- if I understand it  
22 correctly, is the proof that there was an attempted  
23 robbery is so convincing that no other theory was  
24 available.

25 MR. HOOD: Well, that's the facts that we had in

1     this case. And your analysis there again will -- will  
2     hinge on whether or not -- in Mississippi admittedly  
3     murder would be a lesser-included offense if the facts  
4     support it and also manslaughter. But now, if you apply  
5     the Federal standard --

6             JUSTICE KENNEDY: But I still don't understand  
7     your answer to Justice Stevens' question. I had the -- I  
8     had the same problem. The evidence of robbery here was  
9     circumstantial, strong, but still circumstantial based on  
10    his earlier statements that he was going to make a sting,  
11    I think he said, and then the witness saw him outside the  
12    window and -- and he stopped the car. And I take it, he  
13    didn't take the stand and say, I stopped the car to ask  
14    for directions or something. But still it's -- it's --  
15    that's certainly a jury issue as to whether there was a  
16    robbery.

17            MR. HOOD: Yes, sir, it is. It's -- the -- the  
18    facts were in this case, though, all night long they had  
19    ridden around looking for someone to rob. They made a  
20    statement in Tupelo --

21            JUSTICE KENNEDY: But -- but would the State of  
22    Mississippi take the position that if there was no  
23    robbery, there was no crime in this case --

24            MR. HOOD: No, sir.

25            JUSTICE KENNEDY: -- when a man is shot and

1 killed?

2 MR. HOOD: On the facts that we had, if -- if  
3 you analyze it under the Federal standard -- and I would  
4 submit to the Court that we should apply --

5 JUSTICE KENNEDY: No. I'm talking about just  
6 Mississippi law. You're the prosecutor saying, we -- we  
7 may not get robbery here. The -- is that the only thing  
8 they charge is robbery or let the man go after he shoots  
9 and kills the person he doesn't even know?

10 MR. HOOD: We don't know -- he didn't know this  
11 defendant.

12 JUSTICE BREYER: No, no, but the question is  
13 suppose we have a different case, not this case.  
14 Everything is the same but for the fact we know for sure  
15 it wasn't a robbery. That's all. Now, in that different  
16 case, is it a crime under the law of Mississippi what  
17 happened?

18 MR. HOOD: Well, first --

19 JUSTICE BREYER: I've told you everything about  
20 the case. It's just like this one except we know it isn't  
21 a robbery. Now, is it a crime? The answer we think is  
22 absolutely it's a crime. And my next question is which  
23 crime.

24 MR. HOOD: Which crime.

25 JUSTICE BREYER: Okay?



1 (Laughter.)

2 JUSTICE KENNEDY: I don't understand.

3 MR. HOOD: Oh, yes, sir. That -- that happens  
4 all the time.

5 JUSTICE BREYER: All right. So there must be --

6 MR. HOOD: But, of course, it's premeditation.  
7 If there were evidence, say, for example --

8 JUSTICE BREYER: No, no, no. They just do it --  
9 who knows why. All we know about them is they went and  
10 killed somebody. Now, I think it's still a crime to kill  
11 people in, I thought, all 50 States, but -- but --

12 (Laughter.)

13 JUSTICE BREYER: So I'm going to say which --

14 JUSTICE GINSBURG: Let's make it -- if we make  
15 it concrete, let's take all that we have in this case is  
16 the testimony that Rice gave. Rice was the one who  
17 observed this murder, and he didn't have any statements  
18 about the defendant needing money to pay off his debt.  
19 You have only that snapshot scene of what the witness saw  
20 from the window, which doesn't establish any robbery at  
21 all because Rice said he didn't observe any robbery going  
22 on. All he observed was the killing. Now, if that's all  
23 you have in this case, a person was killed, an eyewitness  
24 to the shooting, the eyewitness testifies exactly as Mr.  
25 Rice did in this case, what crime would you indict for?



1 charge it if somebody just says, please give me a lesser-  
2 included instruction, even if he's all mixed up as to what  
3 the right crime is.

4 I don't know if that's the law of Mississippi.  
5 From reading the Mississippi Supreme Court opinion, I  
6 would say it wasn't the law of Mississippi because they  
7 say you're not supposed to charge people in ways that  
8 would mix them up. But, I mean, anyway -- but that's the  
9 argument. So what's the response?

10 MR. HOOD: There --

11 JUSTICE BREYER: And don't take the one I just  
12 suggested because I'm not sure that's right. What is your  
13 response?

14 MR. HOOD: There are 12 separate manslaughter  
15 sections in the Mississippi code, not in one section. Our  
16 murder section lists -- lists four just in one section.  
17 There are 12 different ones. We have one if you drive a  
18 nail in a tree and -- and you're -- you're cutting lumber  
19 and it kills someone, that's a manslaughter still.

20 This defendant only requests a culpable  
21 manslaughter instruction. There was no evidence to -- to  
22 support that. The only potentially -- I -- I could even  
23 make a stretch -- would be heat of passion. He did not  
24 request that -- request the instruction, and --

25 JUSTICE SOUTER: Well, is that fatal to him? I

1 mean, that's what we're -- one of the things we're trying  
2 to get at I guess. Is -- is that fatal to him?

3 MR. HOOD: His failure to request --

4 JUSTICE SOUTER: Under Mississippi law, would he  
5 be entitled to a lesser offense instruction if he asked  
6 for the wrong lesser offense? I.e., in this case, if he  
7 failed to ask for heat of passion, would he still be  
8 entitled to a correct lesser instruction, even when he  
9 didn't ask for it?

10 MR. HOOD: Perhaps the judge should correct  
11 within a particular statute, but not go look at all 12  
12 statutes that he's under -- which -- which would classify  
13 as murder.

14 JUSTICE SOUTER: So you say he's not entitled  
15 then.

16 MR. HOOD: Yes, sir.

17 JUSTICE SOUTER: The -- the only thing he would  
18 be entitled to, if he were correct, is the lesser  
19 instruction that he asked for, and if he's not correct,  
20 there's no error.

21 MR. HOOD: Yes, sir. He would have had to -- to  
22 have specifically requested heat of passion. But there  
23 again, I don't believe that he put on evidence to support  
24 even --

25 JUSTICE SOUTER: No. We're just trying to get



1 at what Mississippi law is, and I think you've --

2 JUSTICE STEVENS: And under your view of the  
3 facts, as I understand it, he would have been entitled to  
4 a manslaughter instruction.

5 MR. HOOD: I don't -- that's only a stretch to  
6 answer -- answer Justice Breyer's question.

7 JUSTICE STEVENS: Well, surely -- surely, if one  
8 walks up to a car and shoots the driver dead, that's must  
9 be a crime.

10 MR. HOOD: Yes, sir. It -- it would have to be  
11 classified as --

12 JUSTICE STEVENS: And the question is we don't  
13 know exactly which of your several statutory provisions it  
14 violated, but if it violated one of them, I don't  
15 understand. And if he's correct -- maybe he misrepresents  
16 the law. He tells us, as a matter of State law, if he  
17 asked for the wrong lesser-included instruction, but there  
18 is a correct one, the judge has a duty to give the correct  
19 instruction. That's what -- what the counsel has told us.  
20 And if that's right, I don't understand why he wasn't  
21 entitled to some lesser-included offense instruction.

22 MR. HOOD: I -- I believe what he was addressing  
23 was language within a particular statute, meaning a  
24 lesser-included offense of -- of murder or how you styled  
25 it, whether it be depraved heart murder or -- or felony

1 murder, first degree murder.

2 JUSTICE STEVENS: So it's -- it's your view he  
3 must ask for the correct lesser-included offense  
4 instruction.

5 MR. HOOD: Yes, sir. And -- and there again,  
6 I'd like for the Court to -- to understand my statement  
7 that we should construe this on what -- how the Federal  
8 law -- how you -- how the Federal courts construe it, not  
9 use Mississippi's lesser standard, but let's -- let's  
10 construe it on whether or not, first, it is a true lesser-  
11 included offense because that's -- that's what the Federal  
12 standard is, and that's what we followed in Nebraska.

13 And secondly, if it's a true lesser-included  
14 offense, we have to use the analysis of the Federal courts  
15 which says that it has to use the strict elements test.  
16 Well, murder would not be a lesser-included offense under  
17 Federal law because under the Mississippi capital murder  
18 statute can be with or without deliberate design.  
19 Therefore, there is no deliberate design. It would not be  
20 a lesser-included offense of murder. Manslaughter would  
21 not be a lesser-included offense under that same elements  
22 test because it requires the additional element of sudden  
23 provocation or heat of passion. So I would submit to the  
24 Court, if we apply what's fair under Federal law, what the  
25 floor is under Federal law, we should use the Federal

1 analysis and not Mississippi --

2 JUSTICE STEVENS: But is sudden provocation or  
3 heat of passion part of the prosecution's burden or a part  
4 of his -- one of the -- is it a matter of defense?

5 MR. HOOD: It would be a matter of the defense  
6 raising sudden provocation. And I don't believe that they  
7 -- they certainly didn't put on anything about culpable  
8 negligence. For example, maybe he was spinning the gun in  
9 his hand for culpable negligence. They didn't put on  
10 anything about deliberate design because he didn't want to  
11 testify. His defense was alibi and so he didn't take the  
12 stand and say, I intended to kill this person, therefore,  
13 give me the murder instruction. He's got to put on  
14 evidence to support it, and I don't believe he put on  
15 sufficient evidence for either of those.

16 And -- and I was the district attorney who tried  
17 this case, so factually I -- I remember the -- the -- my  
18 argument was that we couldn't have proved murder if we had  
19 wanted to because there was no premeditation.

20 JUSTICE SOUTER: May I go back to the heat of  
21 passion point? You say he did not put on evidence, but  
22 wasn't there evidence in the record through a State's  
23 witness that at least would have supported a heat of  
24 passion argument, the evidence being that he went up to  
25 the car, no gun was apparent, something happened.

1 Evidence shows that he was sprayed with mace, and at that  
2 point, he pulls out a gun and shoots. That, I suppose, is  
3 evidence of heat of passion. Couldn't he have asked for a  
4 heat of passion instruction even though he did not put on  
5 the heat of passion evidence himself?

6 MR. HOOD: He could have asked for a heat of  
7 passion instruction, but --

8 JUSTICE SOUTER: Okay, but he did not do so.

9 MR. HOOD: -- but he did not do so. Yes, sir.  
10 That -- those facts --

11 JUSTICE SCALIA: Wait. You're -- you're -- I  
12 don't -- you're calling the heat of passion an element of  
13 -- of the crime of manslaughter? It's not an element of  
14 the crime.

15 MR. HOOD: It's sudden provocation, yes, sir.

16 JUSTICE SCALIA: Suppose you walk up and -- and  
17 you blow somebody away. You can't -- there's no heat of  
18 passion. There's no sudden provocation. You just walk up  
19 and blow them away. And you're telling me that that's not  
20 a crime because you can't -- you can't prove heat of  
21 passion? You can't prove one of the other elements of  
22 manslaughter? That can't be right.

23 MR. HOOD: No, sir. The --

24 JUSTICE SCALIA: Why isn't it enough that you  
25 killed somebody?

1 MR. HOOD: If -- if --

2 JUSTICE SCALIA: You killed somebody. You  
3 didn't plan to kill to somebody, so it's not murder.  
4 Okay. But you killed somebody. Surely, there must be  
5 some crime in -- in Mississippi that -- that covers that.

6 MR. HOOD: Yes, sir. You --

7 JUSTICE SCALIA: What is it?

8 MR. HOOD: -- charge murder and -- and the  
9 prosecution --

10 JUSTICE SCALIA: No. It's not murder. It  
11 wasn't -- you know, he didn't -- I didn't walk up to the  
12 -- to the car intending to kill him. As you say, you  
13 couldn't have indicted for murder.

14 MR. HOOD: Likely, the State would -- would have  
15 -- have -- if those were the facts and that's all the  
16 facts that we had, then the State would likely have  
17 charged murder and asked for a lesser-included offense  
18 instruction for manslaughter.

19 JUSTICE SOUTER: Manslaughter being defined as  
20 killing without deliberation?

21 MR. HOOD: Yes, sir.

22 JUSTICE SOUTER: Okay. That's what he --

23 JUSTICE SCALIA: There -- there is a -- you say  
24 there -- there are what? Nine different manslaughter, did  
25 you say?



1 would submit to the Court that -- that they never  
2 requested anything about the felony murder and they never  
3 requested the heat of passion manslaughter.

4 JUSTICE STEVENS: May I ask this question just  
5 to help me sort of -- what are the -- as a matter of State  
6 law, what are the elements of the offense for which he was  
7 convicted?

8 MR. HOOD: Elements of the offense are that he  
9 -- that he -- a killing occurred with or without intent  
10 and that it was in the commission of -- of a crime,  
11 robbery.

12 JUSTICE STEVENS: Those are the two elements.  
13 And so that if you take out with -- in the commission of  
14 another crime and just left the -- the other part of it,  
15 would that also be an offense?

16 MR. HOOD: With or without under Mississippi  
17 law --

18 JUSTICE STEVENS: In other words, you say -- you  
19 say the offenses are killing somebody with or without the  
20 intent to do so --

21 MR. HOOD: Yes, sir.

22 JUSTICE STEVENS: -- and in the course of an  
23 attempted felony. Say you failed to prove the attempted  
24 felony and you proved the remainder of the -- the other  
25 elements. Is he guilty of anything in -- under

1 Mississippi --

2 MR. HOOD: It -- if you -- if you prove the  
3 intent --

4 JUSTICE STEVENS: And if he is, why isn't it a  
5 lesser-included offense is my next question.

6 MR. HOOD: Yes, sir. If you just take those  
7 away and you just have those two elements, with or  
8 without, if it's with intent, then it would be classified  
9 as murder. If it's without, it could possibly be --  
10 without intent, then it could be classified as  
11 manslaughter.

12 JUSTICE STEVENS: It seems to me that then there  
13 are two lesser-included offenses, and either one would  
14 have -- he should have gotten an instruction on both.

15 MR. HOOD: I -- I --

16 JUSTICE STEVENS: And I don't understand why  
17 not.

18 MR. HOOD: Yes, sir, I understand. But there  
19 again, if we go back to what the Federal standards are,  
20 we're talking about what the United States Constitution  
21 requires, and therefore, I would submit to the Court that  
22 we should apply what the Federal law is. And that law is  
23 -- number one, is it a lesser-included offense? Using the  
24 elements test, murder is not a lesser-included offense to  
25 capital murder, and the reason being is because capital



1 murder is with or without intent and you add an additional  
2 element of murder which requires intent. Same goes for  
3 manslaughter because you had the additional sudden  
4 provocation element.

5           So I would say that if we follow the Federal  
6 standard and -- and that's -- that's the floor, and the  
7 floor is it's got to be a lesser-included offense, it --  
8 it's not a -- a lesser-included offense. So therefore  
9 that should answer the question.

10           Secondly, under the Federal standard, you have  
11 to prove that -- that the court -- the judge has to decide  
12 that the -- a reasonable juror would acquit of the greater  
13 offense and also convict of the lesser. Well, Mississippi  
14 law does not require that, but I -- I'd submit to the  
15 Court that -- that after the Beck decision in 1980, our  
16 supreme court in the case of In re Jordan -- they applied  
17 the Federal standard. They required that -- when they  
18 analyzed Beck, they applied the Federal standard, in other  
19 words, the -- the part about that you have to acquit. You  
20 have to acquit on -- on the greater offense. And they  
21 also included the lesser-included offense language in that  
22 Beck analysis.

23           So, therefore, had he properly raised the  
24 jurisdictional issue -- there's nowhere in the record does  
25 he cite Beck. There's nowhere in the record that he

1 states facts that would even support Beck. So had he even  
2 properly reached that issue and -- and cited Beck, I would  
3 submit to the Court that the facts don't support it under  
4 Mississippi law. The facts don't support it under Federal  
5 law. And it doesn't meet the lesser-included offense  
6 standard.

7 JUSTICE SOUTER: May -- may I ask you? I'm  
8 unclear on -- on lesser-included in Mississippi. And I'm  
9 going to take this step by step.

10 MR. HOOD: Yes, sir.

11 JUSTICE SOUTER: And tell me if I'm right or  
12 wrong at each step.

13 The offense that he was charged with -- the  
14 capital offense that he was charged with was killing with  
15 or without intent in the course of committing a crime. Is  
16 that correct?

17 MR. HOOD: Yes, sir.

18 JUSTICE SOUTER: All right. Now, his claim --  
19 let's assume he claimed this. There is evidence from --  
20 from which you -- you could infer that he wasn't  
21 committing a crime. He may or may not be right, but let's  
22 assume that's his claim, and let's assume the judge says,  
23 yes, there's some evidence that would indicate that he  
24 wasn't up there robbing at the time he stood next to the  
25 car. Assume the judge accepts that. He then says, on

1     that assumption, I want a lesser-included offense  
2     instruction of simple murder, killing with intent. Is  
3     that a lesser-included offense under -- under capital  
4     murder?

5             MR. HOOD: There again, Your Honor --

6             JUSTICE SOUTER: Because what he's saying is,  
7     I'm asking for an instruction on an offense which is  
8     lesser -- it does not -- it's an offense that doesn't  
9     include the course of the crime, but it does include the  
10    other elements. It includes killing with intent. Isn't  
11    that lesser-included on your definition of Mississippi  
12    homicide law?

13            MR. HOOD: No, sir. And -- and I would say that  
14    under the Federal standard, clearly it's not a lesser-  
15    included offense. I would say under the State --

16            JUSTICE SOUTER: Yes. I mean, he's got to  
17    qualify under the Federal standard. He says, the offense  
18    I was charged with was killing with or without intent,  
19    plus crime. I want an instruction that says nothing about  
20    plus crime but simply charges on killing with or without  
21    intent. Isn't he asking under Federal law for a lesser-  
22    included instruction?

23            MR. HOOD: No, sir. He didn't -- first of all,  
24    he never --

25            JUSTICE SOUTER: All right. Confine it to



1 intent, and that's why you say it's not a lesser-included  
2 offense because for plain murder, you need intent, and for  
3 felony murder, you don't need intent.

4 MR. HOOD: Thank you, sir.

5 JUSTICE SCALIA: Isn't that -- isn't that your  
6 case?

7 MR. HOOD: Yes, sir.

8 JUSTICE SOUTER: So that the Mississippi law for  
9 felony murder is killing, pure and simple, plus crime, and  
10 simple murder is killing plus intent. And that plus  
11 intent is why it is not lesser-included.

12 MR. HOOD: Yes, sir, on a felony --

13 JUSTICE SOUTER: Okay. I understand you now.

14 Let -- let me ask you this as a matter of -- on  
15 -- on the second point, as a matter of Mississippi law.  
16 Under the charge of capital murder, was there a  
17 possibility of sentencing to life or life without parole,  
18 as well as the possibility of the death penalty upon  
19 conviction?

20 MR. HOOD: Yes, sir, and that's why I would  
21 submit to the Court it distinguishes --

22 JUSTICE SOUTER: Okay. So that's the second  
23 reason why it would not fall within the -- the Beck rule.

24 MR. HOOD: Yes, sir.

25 JUSTICE SOUTER: Okay.

1 MR. HOOD: I'd like to also point out factually  
2 that in the -- in the -- initially in the petition, the --  
3 and actually at trial and at the Mississippi Supreme  
4 Court, they talked about that the defendant may have been  
5 able -- may have been out there selling drugs to the  
6 defendant. I'd submit to the Court that a proper view of  
7 the record, if you look at the Mississippi Supreme Court  
8 opinion at page 98 and -- 97 and 98 and page 40, the  
9 defendant in his own brief admits that that was not in  
10 evidence. It came from the -- from a plea where the --  
11 where one of the co-defendants pled, and it never was  
12 placed before the jury.

23 I'd also like to ask the Court to -- to note  
24 that in Hopkins v. Reeves in footnote 7, the -- the Court  
25 suggests that we don't decide that -- that particular case

1 based upon the bifurcation issue alone. I would ask that  
2 the Court answer that question in this particular case and  
3 state that Beck has no application in this particular case  
4 because the danger that occurred and the Court was  
5 concerned with in Beck is not -- doesn't happen here in  
6 the Mississippi instance because in Jackson v. State, we  
7 had already said that you have a bifurcated hearing --

8 JUSTICE STEVENS: Well, but -- but it is true  
9 that -- that there's a difference between becoming  
10 eligible for the death penalty, on the one hand, and not  
11 being eligible on the other. And conceivably the Beck  
12 concern is triggered when the failure to give a lesser-  
13 included offense gives the jury the option of -- no other  
14 option other than convicting of a capital offense.

15 MR. HOOD: Justice Stevens, I -- I would  
16 respectfully disagree. We believe that the -- the Beck  
17 issue is just with this question. You have a choice of  
18 guilt and death penalty or acquittal. This question that  
19 they're raising is conviction, not death penalty, or  
20 acquittal. And those are separate issues.

21 JUSTICE STEVENS: -- an offense for which the  
22 death penalty is the punishment.

23 MR. HOOD: Yes, sir, but it doesn't impact the  
24 guilt phase, and that was what the problem was, I believe,  
25 in Beck, was that -- that a jury might not -- they don't

1 want to turn him loose because -- and they give him a  
2 conviction, which automatically carries the death penalty.  
3 And that impacts the jury. And I understand that. That  
4 was a proper decision, but that just didn't happen here in  
5 this particular case. And Mississippi has just  
6 distinguished Beck.

7 I don't believe that they properly raise this  
8 Court's jurisdiction. They never cite Beck. They never  
9 raised -- they never said due process.

10 JUSTICE STEVENS: No, but if the jurors' concern  
11 is that you either have to acquit them or -- we want to  
12 make sure he never walks out of prison again, and the only  
13 way to do that is to convict him of a capital offense so  
14 the judge can impose the death penalty. I don't know why  
15 that Beck wouldn't be triggered on those facts.

16 MR. HOOD: Well, maybe I don't understand the  
17 question correctly. But in Beck, you know, the jury  
18 wasn't told that the judge would have a separate option of  
19 denying the death penalty. In this case, judge in State's  
20 -- court instruction C-5, the court says you are not to  
21 consider the sentence, that you only consider the issue of  
22 guilt or innocence of the charge. And so that's why I say  
23 this is not a Beck issue because it doesn't impact the --  
24 the jury's determination in the guilt phase.

25 JUSTICE KENNEDY: Well, it seems to me that



1 works against you because it takes away from the jury the  
2 option of saying, well, we'll convict him of a serious  
3 offense, but we'll be sure not to give him a capital  
4 offense. So that -- it seems to me that that argument  
5 then works against you.

6 MR. HOOD: Well, Justice Kennedy, in  
7 Mississippi, we have, there again, that open standard, not  
8 the Federal standard. And we would give him that  
9 instruction and give that jury that option if the facts  
10 support it, and I respectfully submit to the Court that --  
11 that the facts do not support a lesser-included offense  
12 under these facts.

13 If the Court has no further questions, thank  
14 you.

15 JUSTICE STEVENS: Thank you, General Hood.

16 Mr. Mitchell, you have about 4 and a half  
17 minutes left.

18 REBUTTAL ARGUMENT OF RONNIE M. MITCHELL

19 ON BEHALF OF THE PETITIONER

20 MR. MITCHELL: Justice Stevens, and -- and may  
21 it please the Court:

22 With regard to the argument that the State makes  
23 here that these individuals had ridden around all night  
24 with a plan to rob and that, therefore, there were no  
25 other -- there was no other possibility for the court to

1 consider in -- in granting instructions, first, it is our  
2 contention that both Mississippi law and due process law  
3 requires a judge to instruct a jury on all of the relevant  
4 issues in the case, on all the relevant law in the case.  
5 And in Fairchild v. State, that is precisely what the  
6 Mississippi court did in saying that a court could not  
7 simply conclude, no matter how strong the evidence of  
8 attempt to rob or plan to rob, that it could, in effect,  
9 direct a verdict and not instruct on lesser-included  
10 offenses.

11 JUSTICE KENNEDY: Well, your -- were the two  
12 principal lesser-included offenses in -- in your view your  
13 D-13 and D-18 that are in the appendix?

14 MR. MITCHELL: Your Honor, those are the ones  
15 that were -- were, in fact, raised. We believe that  
16 rather than intent the -- on the simple murder, that the  
17 issue is malice as opposed to intent. The statutory  
18 definition, for example, of manslaughter in -- in  
19 Mississippi statute 97-3 -- I believe -27 is a killing of  
20 a human being without malice and while not in the  
21 commission of these felonies.

22 Now, it may be that simply a small-town lawyer  
23 from -- from North Carolina is told don't go to the big  
24 city and get stung by some guy coming up to you and  
25 saying, you know, I just got off the bus and I need to get

1     some money from you and my kids and my wife are waiting  
2     for me in the hotel room. But that happens not only in  
3     the big city, it also happens in Mississippi. And so  
4     there was a basis in which a jury could reasonably infer  
5     that there was a reason to approach that vehicle other  
6     than an attempted robbery. And the question is, what is a  
7     reasonable inference?

8             The Mississippi court here in its opinion said  
9     that there was clearly evidence from which a jury could  
10    infer robbery. We concede that, but there were also other  
11    inferences that this evidence raised, and that evidence,  
12    we respectfully submit, mandated a lesser-included offense  
13    instruction.

14            We also contend that -- that the State has not,  
15    heretofore, raised any issue about Beck's continuing  
16    vitality, but we respectfully submit that Beck is of  
17    continuing vitality. Just a -- a survey of even habeas  
18    corpus cases from the various circuits will show that the  
19    circuits are continuing to apply Beck even in States where  
20    the statutory sentencing scheme is far different from Beck  
21    and there is no preclusive statute involved, as there was  
22    in Alabama.

23            We respectfully submit that the language in Beck  
24    itself speaks to this issue. The Beck court added, the  
25    same reasoning must apply to rules that diminish the

1 reliability of the -- the guilt determination, the very  
2 point that Justice Kennedy pointed out undercuts  
3 Mississippi's argument. It is this diminution of the  
4 reliability of the guilt determination that is at issue  
5 here.

6 In addition to that, we would respectfully  
7 submit that under these circumstances, there was a basis  
8 under which a lesser-included offense instruction was  
9 mandated because Beck did not apply the Blockburger test.  
10 In fact, it did not incorporate Blockburger, did not refer  
11 to Mullaney v. Wilbur. What it did was it said if there  
12 is a lesser-included offense, as defined by State law.  
13 All of the succeeding cases from this Court have said if  
14 there is a lesser-included offense, as defined by State  
15 law, conceding that State law is the applicable standard  
16 then and not the standard that the State now seeks to  
17 impose, which it never raised in -- in its brief, which it  
18 has never asserted to be the standard. Blockburger is  
19 certainly not cited in anything that the State has  
20 submitted. Blockburger is not contended to be the basis,  
21 nor could it be. The basis is is there a lesser-included  
22 offense under State law, and we contend that that is the  
23 basis on which this case should be decided.

24 Thank you very much.

25 JUSTICE STEVENS: Thank you, Mr. Mitchell.

1                   The case is submitted.

2                   (Whereupon, at 12:04 p.m., the case in the  
3 above-entitled matter was submitted.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25